

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

ALAN WILLIS, Individually and on Behalf of )	No. 2:12-cv-00604-MHW-NMK
All Others Similarly Situated, )	
Plaintiff, )	<u>CLASS ACTION</u>
vs. )	
BIG LOTS, INC., et al., )	
Defendants. )	
_____ )	

REPLY TO DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S REQUEST FOR  
JUDICIAL NOTICE OF BIG LOTS' 10b5-1 TRADING POLICY PURSUANT TO  
FEDERAL RULE OF EVIDENCE 201

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Defendants do not oppose plaintiff's request for judicial notice of Big Lots Inc.'s ("Big Lots" or the "Company") "Company policy" that allowed its insiders to amend their 10b5-1 trading plans to sell shares during and shortly after a purported "trading window." *See* Defendants' Response to Lead Plaintiff's Request for Judicial Notice of Big Lots' 10b5-1 Trading Policy Pursuant to Federal Rule of Evidence 201 (Dkt. No. 46) at 3. Plaintiff's request should therefore be granted.

Instead, defendants use their response to argue that the mere presence of a self-declared "trading window" somehow shields highly suspect trades by corporate insiders from judicial scrutiny. *See* Dkt. No. 46 at 3-5. Defendants provide no authority for this proposition because none exists.<sup>1</sup> There is no "window" companies can adopt to allow their insiders to reap personal profits from trades on the basis of material, non-public company information. To the contrary, Rule 10b5-1 makes no reference to trading windows and requires that insiders adopt plans "[b]efore becoming aware of the information" and to not have "subsequent influence over how, when, or whether to effectuate purchases or sales." 17 C.F.R. §240.10b5-1(c)(A)(1), (B)(3) (emphasis added).<sup>2</sup>

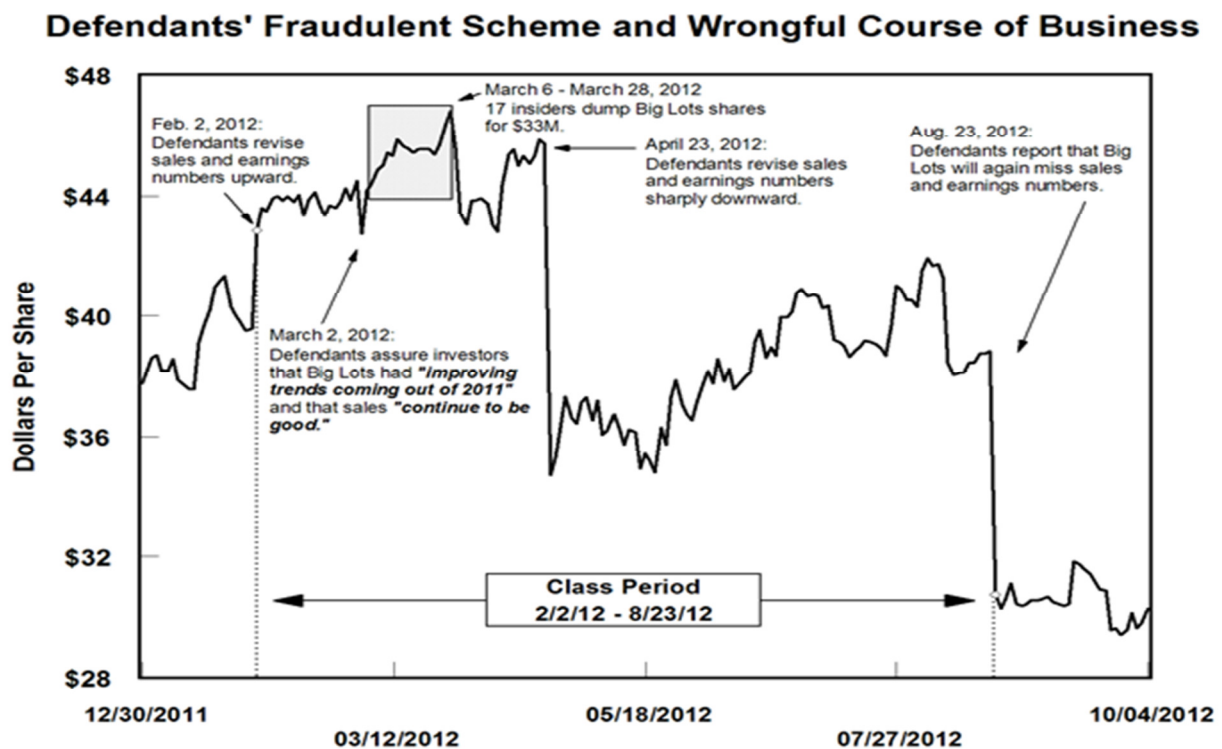
The central allegation of the Amended Complaint for Violations of the Federal Securities Laws ("Amended Complaint") (Dkt. No. 18) is that Big Lots' insiders were in possession of material, non-public information regarding Big Lots' declining sales and earnings trends during the

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<sup>1</sup> Defendants' response instead refers to their own brief in support of their motion to dismiss, *see* Dkt. No. 46 at 3, but the only case defendants cite for their position, *Johnson v. Hui*, 811 F. Supp. 479 (N.D. Cal. 1991), provides no support. *Johnson*, unlike this case, concerned the question of whether a derivative suit should be terminated in deference to a special litigation committee finding that the suit would not be in the company's best interests after a thorough investigation by outside counsel. Further, the committee had noted that "most sales" occurred pursuant to trading plans put in place prior to the alleged period of insider trading activity and occurred at a sales price *lower* than the price of the stock after the truth was allegedly revealed. *Id.* at 487-88. Neither situation exists here.

<sup>2</sup> Although defendants suggest that there are other aspects of the Company policy that may have been in place in March 2012 (during the Class Period), they do not state what those other aspects may have been or otherwise contend that there was any different policy in place. *See* Dkt. No. 46 at 2-3.

Class Period. *See* Dkt. No. 18, ¶¶8-17, 56-95. As now evidenced by Big Lots' 10b5-1 policy, Company insiders were allowed to unload their personal stockholdings during the Company's March 2012 "trading window" and amend their 10b5-1 plans to do so shortly thereafter on the basis of this material, non-public information. These sales allowed those insiders to reap \$33 million in proceeds from insider sales between March 6 and March 28, 2012:



As discussed more fully in the Amended Complaint, the timing, amount, and coordination of these sales is highly suspicious, not least because it was a dramatic break from the Company's precedent. *See* Dkt. No. 18, ¶¶155-160. The sales were deemed to raise a "red flag" by numerous media outlets, including *The Wall Street Journal*, sparked multiple governmental investigations and private lawsuits, and preceded the abrupt "retirement" of the Company's Chief Executive Officer and the firing of its General Counsel. *See* Dkt. No. 18, ¶¶25, 139-142, 166; Request for Judicial Notice, Exhibit A (Dkt. No. 37). The fact that these same insiders declared their trades to be made during a purported "trading window" is legally irrelevant and provides cold comfort to Big Lots'

public investors who lost millions after the Company's stock price collapsed when the truth was finally revealed.

DATED: December 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 3, 2014.

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